

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF ISSAQUAH**

In the Matter of the Application of)	No. VAR13-00001
)	
William and Cheryl Sundby)	Blackwell/Sundby Residence
)	
)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Variance</u>)	AND DECISION

SUMMARY OF DECISION

The request for a variance from City of Issaquah Critical Areas Regulations to allow construction of a single-family residence at 645 Mt. Everest Lane SW is **APPROVED**. Conditions are necessary to mitigate project impacts and to ensure compliance with the Issaquah Municipal Code.

SUMMARY OF RECORD

Hearing Dates:

The Hearing Examiner held a public hearing on the request on March 3, 2016. After a challenge to the notice provided to the public, the Applicant requested a continuance to allow proper notice. The Hearing Examiner granted the continuance without objection, and the hearing resumed on March 30, 2016. On March 30, 2016, the Hearing Examiner ordered that the record be held open until April 15, 2016, to allow for its full development.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Peter Rosen, City Senior Environmental Planner
Craig Kruger, Applicant Planner
Glen Coad, Applicant Project Engineer
Peter Super, Applicant Wetland Specialist
Connie Marsh
Stephen Russell Joe

Attorney Terry Brink represented the Applicant at the hearing

Exhibits:

The following exhibits were admitted into the record:

1. Applications:
 - a. Land Use Permit Application, received November 27, 2013
 - b. Revised Land Use Permit Application, received April 17, 2015
2. Vicinity Map, undated
3. Site Plans (10 sheets), dated December 3, 2015
4. Critical Area Study, Evergreen Aquatic Resource Consultants, revised April 7, 2015

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5. Geotechnical Engineering Report, GeoResources, LLC, revised April 3, 2015
6. Geotechnical Peer Review Comments, Golder Associates, dated July 22, 2015
7. Response to Geotechnical Peer Review Comments, Development Engineering PLLC, dated August 22, 2015
8. Geotechnical Peer Review, Golder Associates, dated September 4, 2015
9. Wildlife Habitat Evaluation, Raedeke Associates, dated October 27, 2014
10. Drainage Report, Development Engineering PLLC, dated April 3, 2015
11. Public Notice Materials:
 - a. Published Notice of Public Hearing, *Issaquah Press*, February 25, 2016
 - b. Affidavit of Service of Mailing, dated February 18, 2016, with attached notice of public hearing
 - c. Affidavit of Service of Mailing, dated January 8, 2016, with attached notice of application
12. Public Comments:
 - a. Email from Russell Joe to Peter Rosen, dated November 10, 2015
 - b. Email from Cory Christensen to Brian Berntsen, dated October 27, 2015
 - c. Email from Francis Pope to Peter Rosen, dated October 27, 2015
 - d. Letter from Francis Pope to Peter Rosen, undated
 - e. Email from Connie Marsh to Peter Rosen, dated April 30, 2014
 - f. Email from David Reuland to Peter Rosen, dated January 22, 2014
 - g. Letter from Truus Lagerman and Thomas Mous to Peter Rosen, dated January 17, 2014
 - h. Email from Tyree Westerman to Peter Rosen, dated January 12, 2014
 - i. Email from Stephen Russell Joe to Peter Rosen, dated March 2, 2016
13. River & Stream Board Public Meeting Minutes, dated February 4, 2014
14. SEPA Determination, issued January 7, 2016
15. Staff Report, dated March 3, 2016
16. Public Notice Materials:
 - a. Affidavit of Service of Mailing, dated February 25, 2016
 - b. Affidavit of Service of Mailing, dated March 16, 2016, with attached notice of public meeting, vicinity map, site plans, and distribution list
 - c. Affidavit of Sign Installation, dated March 11, 2016, with attached email from Terry Brink to Peter Rosen
17. Public Comments:
 - a. Email from Francis Pope to Peter Rosen, dated March 16, 2016
 - b. Email from David Reuland to Peter Rosen, dated March 16, 2016
 - c. Email from David Reuland to Peter Rosen, dated March 17, 2016, with attached email string
 - d. Email from Stephen Russell Joe to Peter Rosen, dated March 22, 2016
 - e. Email from Cory Christensen to Peter Rosen, dated March 10, 2016
 - f. Email from Ruth Frank to Peter Rosen, dated March 2, 2016
 - g. Email from Ruth Frank to Peter Rosen, dated March 29, 2016
 - h. Email from Cory Christensen to neighboring property owners, dated March 10, 2016

18. Staff Report, dated March 30, 2016
19. Letter from Terry Brink to the Hearing Examiner summarizing notice given for the March 30, 2016, public meeting, dated March 30, 2016, with attached Affidavit of Service of Mailing, dated March 16, 2016; Notice of Public Meeting published in the *Issaquah Press* on March 17, 2016; and Affidavit of Sign Installation, dated March 11, 2016.
20. Letter from Terry Brink to the Hearing Examiner describing the application, with attached:
 - a. Vicinity Maps, dated February 19, 2016
 - b. Assessor's Parcel Maps, dated February 19, 2016
 - c. Aerial Site Photographs, dated February 19, 2016
 - d. Assessor's Parcel Information Documents, dated February 19, 2016
 - e. Site Plans, dated December 2, 2015
 - f. Critical Area Study: Wetlands, Evergreen Aquatic Consultants, revised April 7, 2015
 - g. Geotechnical Assessment, GeoResources, LLC, revised April 3, 2015
 - h. Drainage Report, Development Engineering, PLLC, dated April 3, 2015
 - i. Letter from Craig Krueger to Peter Rosen, dated December 3, 2015
 - j. Wetland Mitigation Plan/Bond Worksheet, Aquatic Resource Consultants, LLC, dated November 30, 2015
 - k. Revised Site Plan Addendum Letter, GeoResources, LLC, dated December 1, 2015, with attached Site Plans, dated November 30, 2015
 - l. Site Plans, dated December 2, 2015
 - m. GeoBrugg Barrier System information, undated
 - n. Mitigation Determination of Nonsignificance, dated January 7, 2016
 - o. Notice of Application, dated January 8, 2016
 - p. List of Parties of Record, dated February 12, 2016, with attached public comments
 - q. Wildlife Habitat Evaluation, Raedeke Associates, Inc., dated October 27, 2015
 - r. Preliminary Commitment for Title Insurance, First American Title Insurance Company, dated March 3, 2016
 - s. Staff Report, dated March 3, 2016

Orders and Post-Hearing Submittals

- Post-Hearing Order, dated March 31, 2016
- Memorandum from Peter Rosen to the Hearing Examiner, dated April 7, 2016
- Memorandum from Terry Brink to the Hearing Examiner, dated April 15, 2016, with attached Federal Highway Administration Environmental Review Toolkit
- Memorandum from Stephen Joe to the Hearing Examiner, undated, with attached Washington State Department of Transportation Guidance on Preparing Cumulative Impact Analyses and Cumulative Impacts Flowchart

The Hearing Examiner enters the following Findings and Conclusions based upon the admitted testimony and exhibits:

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FINDINGS

Application and Notice

1. William and Cheryl Sundby (Applicant) request a variance to allow construction of a single-family residence at 645 Mt. Everest Lane SW. The Applicant requests reductions in the 50-foot buffers required around the Category III wetlands on the subject property to a minimum of 5 feet, as well as reductions in the 15-foot setbacks required around those buffers, also to a minimum of 5 feet. The Applicant also requests a reduction in the buffer required around the 40 percent steep slope areas present on the property from 50 feet to 10 feet. *Exhibit 1; Exhibit 4; Exhibit 5; Exhibit 18, Staff Report, pages 2 to 3.*
2. The City of Issaquah (City) received the variance application on November 27, 2013, and deemed the application complete on December 19, 2013.¹ The City mailed notice of the application to adjacent property owners and parties of record on January 8, 2014. On May 15, 2014, City staff notified the Applicant of concerns about the project. In response, the Applicant substantially modified the request and proposal over approximately the next year and a half. These modifications included a decrease in the size of the proposed single-family residence and the addition of a second lot to the subject property. Applicant Attorney Terry Brink stated at the public hearing that the Applicant does not believe the City unduly delayed consideration of the application. *Exhibit 1; Exhibit 20; Statement of Mr. Brink.*
3. The City scheduled a public hearing on the application for March 3, 2016. The City mailed notice of the public hearing to adjacent property owners and parties of record on February 18, 2016. The City published notice of the public hearing in the *Issaquah Press* one week later. The notice provided by the City prompted a number of comments from neighboring property owners, as discussed more fully below. *Exhibit 11.*
4. On March 2, 2016, Stephen Russell Joe emailed City Senior Environmental Planner Peter Rosen, alleging that the Applicant and City failed to provide proper notice of the public hearing.² On March 3, 2016, the Hearing Examiner convened the hearing and addressed

¹ The application deemed complete by the City was submitted by Jon and Joy Blackwell, who owned the property before the Sundbys. The Sundbys submitted a revised application received by the City on April 17, 2015. *Exhibit 1.a; Exhibit 1.b.*

² Mr. Joe alleged in his email that the Applicant and City provided notice that failed to comply with constitutional and City code provisions governing notice of the public hearing on the application.

The due process clauses of the state and federal constitutions govern constitutional notice. *U.S. CONST. amend XIV, § 1; WASH. CONST. art. I, § 3.* Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the proceeding and afford them an opportunity to be heard on the matter. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). Such notice must reasonably convey the required information and afford a reasonable time for interested parties to appear. *Id.* Mr. Joe argued in his email that parts of the mailed notice identified the

Mr. Joe's notice challenge. Mr. Rosen, Applicant Planner Craig Kruger, Mr. Joe, Cory Christensen, and Connie Marsh were in attendance. Mr. Joe's email to Mr. Rosen was admitted without objection. Mr. Kruger requested continuance of the hearing until March 30, 2016, to allow the Applicant and City to remedy the notice defects identified by Mr. Joe. Mr. Rosen testified that the City would address Mr. Joe's concerns if the Hearing Examiner continued the hearing. The Hearing Examiner allowed all members of the public in attendance at the hearing to object to the continuance, but none did. The Hearing Examiner then continued the hearing to March 30, 2016. *Exhibit 12.i; Testimony of Mr. Kruger; Testimony of Mr. Rosen.*

5. On March 11, 2016, the Applicant posted notice of the continued public hearing on the property. On March 16, 2016, the City mailed and emailed notice of the continued public hearing to interested parties and adjacent property owners. On March 17, 2016, the City published notice of the continued public hearing in the *Issaquah Herald*. *Exhibit 16.b; Exhibit 16.c; Exhibit 18, Staff Report, page 3; Exhibit 19.*
6. A number of neighboring property owners commented on the proposed project. These comments generally concerned:
 - the stormwater control impacts of the proposed project
 - the Applicant's plan for wetland enhancement
 - the environmental impacts of the proposed project
 - the size of the proposed single-family residence
 - possible landslides caused by the proposed project
 - view obstruction from the proposed single-family residence
 - the sewer system proposed by the Applicant
 - blockage of public access through the site, and
 - parking impacts on the cul-de-sac off which the proposed single-family residence would be located.

Exhibit 12; Exhibit 17.

State Environmental Policy Act

7. The City acted as lead agency and analyzed the environmental impacts of the proposal under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW. The City

wrong property and that other parts of the notice failed to adequately identify the property and explain the proposal. *Exhibit 12.i.*

The City code requires applicants to post notice of proposed land use applications and the associated public hearing for some projects. *Issaquah Municipal Code (IMC) 18.04.180.C.4.* An applicant's failure to properly do so requires continuation or postponement of the hearing until proper notice is given. *IMC 18.04.180.C.4.* The notice must contain certain information, and the applicant must post the notice at the midpoint of the property's street frontage, unless directed otherwise by the City. *IMC 18.04.180.C.4.d, .e.* The notice must not be obstructed by vegetation or other sight impediment. *IMC 18.04.180.C.4.e(3).* Mr. Joe stated in his email that the Applicant did not post notice in an unobstructed location on the property's frontage and that the posted notice did not contain the necessary information. *Exhibit 12.i.*

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reviewed the Applicant's environmental checklist and other information on file and determined that, with mitigation measures, the proposed variance would not have probable significant adverse impacts on the environment, and issued a Mitigated Determination of Nonsignificance (MDNS) on January 7, 2016. MDNS mitigation measures require the Applicant to limit grading/clearing to the proposed development area and record a Native Growth Protection Easement (NGPE) for the remainder of the site; delineate the NGPE with permanent markers; stage construction to minimize impacts on the property and neighboring properties; install split rail fences along wetland boundaries; use low-impact fertilizers, pesticides, and herbicides; show that the proposal does not affect wetland hydrology; conform wetland buffer enhancement plans to the King County Critical Areas Mitigation Guidelines and obtain approval for those plans; obtain a biologist's certification that the buffer enhancements were planted according to the approved plan; post a 5-year monitoring and maintenance bond for the wetland and wetland buffer mitigation plan; submit geotechnical reports evaluating building plans; minimize impacts of a proposed sewer line; and retain existing snags and downed trees by moving them to wetland or forest areas on the property. The Muckleshoot Tribe requested a copy of the proposed mitigation plan. There were no direct comments on, or appeal of, the MDNS determination. *Exhibit 14; Exhibit 18, Staff Report, page 3.*

Comprehensive Plan, Zoning, and Surrounding Property

8. The property is designated Low Density Residential by the City Comprehensive Plan. The City adopted the LDR Comprehensive Plan designation to provide a variety of housing types within a full range of urban services. *Former City Comprehensive Plan, Land Use Element, page L-11 (2006).* The LDR designation is appropriate for property containing critical areas, provided that the critical areas are protected. *Former City Comprehensive Plan, Land Use Element, page L-11.* As discussed below, the proposed project contains mitigation measures that would enhance wetland and wetland buffer functions. *Exhibit 1; Exhibit 18, Staff Report, pages 2 and 4.*
9. The property is zoned Single-Family Suburban (SF-S). The City adopted the SF-S zone primarily to provide for single-family neighborhoods in an urban setting, while buffering those neighborhoods from commercial services. *Issaquah Municipal Code (IMC) 18.06.100.c.* Lots in the SF-S zone must be a minimum of 9,600 square feet and 70 feet wide. *IMC 18.07.360. Exhibit 1; Exhibit 18, Staff Report, page 2.*
10. Hillside Park sits north of the property. Mt. Hood water reservoir and City-owned open space lie west of the property. Lots to the south and east are, where developed, developed with single-family residences. The size of the single-family residence proposed by the Applicant is comparable to the sizes of nearby homes. *Exhibit 1; Exhibit 2; Exhibit 4; Exhibit 18, Staff Report, page 2.*

Existing Property

11. The property is located west of Mt. Everest Lane SW and north of Mount Fury Circle SW. The property, which is comprised of two lots, is an irregularly shaped but roughly

rectangular and approximately 180 feet wide, 240 feet deep, and 45,100 square feet in area. The property sits on a hillside, sloping down from the southwest to the northeast. The southern slopes incline between 80 and 110 percent, with vertical heights of 40 to 50 feet. The western slopes incline between 30 and 40 percent, with vertical heights of approximately 20 feet. Evergreen Aquatic Resource Consultants, LLC (EARC), performed a wetland delineation survey on the property and determined that two Category III wetlands sit on it. The first, Wetland A, occupies 6,645 square feet of the northeastern portion of the property. The second, Wetland B, measures 3,110 square feet and extends westward from the midpoint of the eastern property border. A relatively flat area sits between these two wetlands near the toe of the on-site slopes. This flat area, where the proposed residence would sit, along with the area projecting east, where the Applicant would build the driveway, provides 7,405 square feet of developable area. Mr. Rosen testified that this developable area constitutes 16 percent of the total site area. The property is wooded, with a mix of older fir and deciduous trees; the vegetation understory consists of native shrubs, blackberries, salmon berry, holly, and ferns. *Exhibit 3; Exhibit 4; Exhibit 5; Exhibit 18, Staff Report, pages 2 and 6; Exhibit 20; Testimony of Mr. Rosen.*

Proposed Use

12. The Applicant seeks the variance to allow development of the property with a 2,236 square foot, two-story single-family residence. Mr. Krueger testified that the residence would have a 1,500 square foot footprint if measured at the ground and a 1,600 square foot footprint when measured at the eaves. The Applicant would connect the proposed single-family residence to municipal utilities. Mr. Krueger testified that site conditions make a septic tank impracticable. Instead, the Applicant would connect to municipal sewer service using a sanitary sewer transport line running south to the line on Mount Fury Circle SW. To avoid excavating in the steep slope critical areas that the line would traverse, the Applicant proposes using a surface grade transport line, which Mr. Krueger described as a 2-inch pressure line. *Exhibit 1; Exhibit 3; Exhibit 4; Exhibit 5; Exhibit 18, Staff Report, page 2 and 3; Testimony of Mr. Krueger.*
13. Mr. Rosen testified that the proposed single-family residence would not directly impact either of the wetlands or the steep slopes on the property. The single-family residence would sit no closer than 10 feet from the southern boundary of Wetland A and no closer than 5 feet from the western and northern boundaries of Wetland B. Mr. Rosen testified, however, that the proposed single-family residence would encroach within the buffers surrounding the wetlands. That encroachment would amount to a total of 7,130 square feet, which Mr. Rosen testified was approximately 30 percent of the total buffer area. To mitigate the encroachment, the Applicant would enhance 13,742 square feet of wetland buffer and 9,754 square feet of wetland by removing non-native invasive plant species and planting native species replacements. Applicant Wetland Specialist Peter Super testified that the mitigation plan would result in 3:1 mitigation ratio, which would exceed the standard mitigation ratio of 1:1. EARC performed a functional lift analysis to evaluate the effect the proposed enhancement would have on wetland and buffer functionality. EARC determined that the proposed enhancements would improve

functionality, with the greatest increases realized in wildlife habitat and screening functionality. *Exhibit 4; Exhibit 18, Staff Report, page 2; Exhibit 19.j; Testimony of Mr. Rosen; Testimony of Mr. Super.*

Variance

14. The City code defines a *variance* as “[a] modification of the regulations of the City [Land Use] Code as applied to a specific property when authorized by the Hearing Examiner after he/she finds that the literal application of the provisions of this Code would cause undue and unnecessary hardship in view of the facts and conditions applying to a building or lot.” *IMC 18.02.240.*
15. The IMC permits administrative wetland buffer reductions of up to 25 percent. *IMC 18.10.650.D.1.* Buffer reductions of greater than 25 percent require variance approval by the Hearing Examiner. *IMC 18.10.650.D.2; IMC 18.10.430.C.*
16. The IMC permits reduction in the buffer around a steep slope to a minimum width of 10 feet. *IMC 18.10.580.A.1.* The IMC, however, forbids occupied buildings within 25 feet (including the buffer) of the toe of a slope. *IMC 18.10.580.A.2.* The proposed single-family residence would sit at least 25 feet away from the toe of the slope. *Exhibit 18, Staff Report, page 2.*
17. Mr. Rosen testified that the presence of the two Category III wetlands and their buffers leave no portion of the property developable, even with an administrative buffer reduction, necessitating a variance. *Exhibit 4; Exhibit 18, Staff Report, pages 4 through 5; Testimony of Mr. Rosen.*
18. Several neighbors commented on the presence of owls and pileated woodpeckers at the site. Raedeke Associates, Inc. (Raedeke), reviewed the Washington Department of Fish and Wildlife (WDFW) Priority Habitat and Species database for mapped occurrences of species of concern or species listed as sensitive, threatened, or endangered at or near the property. That review disclosed only the potential presence of pileated woodpeckers and Townsend’s big-eared bats.³ Raedeke found evidence of pileated woodpecker forage in snags at the site, but no evidence of active nest or roost sites. Raedeke hypothesized that the forested areas of nearby Hillside Park represented a much larger area of potential pileated woodpecker habitat, implying that perhaps woodpeckers living there forage at the property, a possibility given the large home range of the pileated woodpecker. Raedeke found no evidence of owl nest sites, Townsend big-eared bat roosts, or the presence of other wildlife species listed as endangered, threatened, or other priority status at the property. Raedeke noted that the site plan incorporates mitigation measures, and it determined that the project would not likely reduce the continued persistence of pileated

³ The pileated woodpecker is a state candidate for listing as a sensitive species by WDFW because of its need to nest and forage in mature forests or second-growth forests with significant numbers of large snags (standing dead trees) and fallen trees. *Exhibit 9.*

woodpeckers at the site because of the availability of significant forested habitat nearby. Raedeke further determined that the project would not likely adversely affect other listed or priority species because no such species were either present at the property or expected to inhabit there. *Exhibit 9; Exhibit 12.d; Exhibit 12.g.*

19. Ms. Marsh and Mr. Joe testified about concerns related to run-off from the proposed project. A number of written comments contain similar expressions of concern. Development Engineering, PLLC (DE), prepared an engineered drainage plan and drainage report for the proposed single-family residence. During a site visit, DE observed that surface water enters and leaves the property as sheet flow, with drainage following the grade and water exiting the property to Hillside Park. The Applicant proposes using a dispersion trench to drain stormwater from the roof of the single-family residence. The trench would spread water flow over 22 feet and water dispersed in this manner would flow through 25 feet of vegetation before leaving the property. The Applicant proposes dispersing water from the driveway using sheet flows, this water would flow through at least 10 feet of adjacent vegetated areas. These means of dispersion would replicate existing drainage patterns and drainage from the proposed single-family residence and driveway would be fully dispersed on-site, as required by the 2009 King County Stormwater Management Manual, as amended by the City. Applicant Project Engineer Glen Coad testified that there would be no increased rate of stormwater flow to neighboring properties due to the proposed project. *Exhibit 10; Exhibit 12; Exhibit 17; Testimony of Glen Coad; Testimony of Ms. Marsh; Testimony of Mr. Joe.*
20. The Applicant would use temporary silt fences installed along downhill sections of the graded areas to control erosion during the initial stages of the project. The Applicant would also install a temporary construction entrance. The Applicant would install residential landscaping for permanent erosion control. *Exhibit 10.*
21. A number of written comments about the project contain concerns about slope stability. GeoResources, LLC (GeoResources), evaluated the geotechnical effects of the request and the proposed single-family residence. GeoResources noted that the site satisfied only one of the six criteria used to designate landslide hazard areas, and it observed no evidence of recent slope movement during a site visit. Although the property sits above a former coal mine, the mapped depth of the mine exceeds 300 feet below the surface, and GeoResources determined that the mine was declassified and would not pose a significant risk of property damage. GeoResources recommended a number of measures designed to minimize the risk of a landslide and determined that the proposed single-family residence was suitable on the site from a geotechnical standpoint. Golder Associates peer reviewed the GeoResources report for the City and determined that the proposed project likely provided an adequate factor of safety against deep-seated slope instability. *Exhibit 5; Exhibit 8; Exhibit 12; Exhibit 17.*

22. Mr. Christensen expressed concern that the proposed project would permanently close a trail across the property used by the public. Mr. Brink explained that there is no easement over the property. *Exhibit 20.r; Statement of Mr. Brink.*
23. At the public hearing, Ms. Marsh and Mr. Joe expressed concern that the proposed project would result in adverse local parking impacts. Written public comments echoed these concerns. The Applicant would access the parcel from Mt. Everest Lane SW because the steep slopes prevent access to Mount Fury Circle SW. Mt. Everest Lane SW and the cul-de-sac are apparently quite narrow, which is the source of the neighbors' concerns. Mr. Rosen testified that one of the MDNS conditions addressed the parking concerns. That condition forbids construction staging outside of the project clearing and grading limits. *Exhibit 12; Exhibit 17; Testimony of Ms. Marsh; Testimony of Mr. Joe; Testimony of Mr. Rosen.*
24. The Applicant considered numerous alternative site designs before settling on the current one. The final proposed single-family residence is, as noted above, significantly smaller than the one initially proposed and includes a second lot. The SEPA mitigation measures require the Applicant to record a Native Growth Protection Easement (NGPE). The NGPE would preclude future development on one of the two lots comprising the property; the Applicant could otherwise have requested a variance to develop that lot. *Exhibit 4; Exhibit 18, Staff Report, pages 5 and 6; Exhibit 20.*
25. The Applicant and the prior owners did not create either the steep slopes or the wetlands. The property boundaries were set in 1969, before the adoption of the City critical areas code, when the property was platted. *Exhibit 18, Staff Report, page 6.*
26. On April 7, 2016, City staff submitted a memorandum analyzing possible project cumulative impacts as required by IMC 18.10.430.G. Staff first considered the possibility of other variance requests in the area. Staff noted that, aside from the lots involved in the instant application, there were two other undeveloped lots on Mt. Everest Lane SW. The first parcel, located at 640 Mt. Everest Lane SW, directly east of the property, was the subject of a variance request approved in 2005. That variance expired when the applicant failed to obtain building permits within three years of the variance approval. Staff lacked sufficient information to determine if a variance request would be necessary to develop the other parcel, which is located at 620 Mt. Everest Lane SW. Staff also noted the approval of two other steep slope variances on Squak Mountain over the last 15 years, one in 2003 and one in 2010. The applicants there sought variances to allow construction of single-family residences. Both variances expired before the applicants constructed the proposed residences. *Memorandum from Peter Rosen to the Hearing Examiner, dated April 7, 2016 (hereinafter City Post-Hearing Order (PHO) Response).*
27. Staff's memo then sets out a definition of cumulative impacts by adopting the one given by the Washington State Department of Transportation in its *Guidance on Preparing*

Cumulative Impact Analyses (February 2008) (hereinafter “WSDOT Guidance”). The definition reads:

Cumulative impacts are the summation of impacts on a resource resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes those actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

City PHO Response.

28. Staff’s memo then provides an analysis of the cumulative impacts of variance approvals in the area. Staff noted that all of the lots on the cul-de-sac are existing legal lots. Staff stated that the City has given the lots the Comprehensive Plan designations and local zoning that anticipate their development with single-family residences. The City analyzed the impacts of the anticipated development when performing an Environmental Impact Statement during the process of adopting its Comprehensive Plan. Staff noted that the City has adopted numerous standards and regulations to consider and mitigate for cumulative developmental impacts. As an example, staff cited the City stormwater code, which requires stormwater run-off rates after development to match or not exceed the pre-development rate of run-off in order to address cumulative impacts on receiving waters. *City PHO Response.*
29. Mr. Joe submitted a memo critiquing City staff’s cumulative impact analysis. In the memo, Mr. Joe, citing case law interpreting the federal National Environmental Policy Act found in the *WSDOT Guidance*, stated that a cumulative impacts analysis must be sufficiently detailed to be useful in deciding whether, or how, to alter a proposal to lessen cumulative impacts. Mr. Joe then contended that staff had generalized too greatly in analyzing cumulative impacts and had also incorrectly determined that it lacked sufficient information to determine whether a variance was necessary to develop the lot at 640 Mount Everest Lane SW.⁴ Mr. Joe requested that the record be left open and that the City perform the eight-step cumulative impact analysis set out in the *WSDOT Guidance*.⁵

⁴ City staff, in fact, acknowledged that a variance would be necessary to develop the parcel at 640 Mount Everest Lane. City staff stated that it lacked sufficient information about the presence of critical areas to determine whether a variance would be necessary to develop the lot at 620 Mount Everest Lane. *Exhibit 18, Staff Report, page 4; Memorandum from Peter Rosen to the Hearing Examiner, Blackwell/Sundby Variance – VAR13-0001 Post-Hearing Order – Cumulative Impacts, dated April 7, 2016.*

⁵ Those steps require (1) identifying the resources that may have cumulative impacts to consider; (2) defining the study area and timeframe for affected resources; (3) describing the current health and historical context for each resource; (4) identifying the direct and indirect impacts that may contribute to a cumulative impact; (5) identifying other historic, current, and reasonably foreseeable future actions that may affect the resource; (6) assessing potential cumulative impacts, including the magnitude and source;

Memorandum from Stephen Joe to the Hearing Examiner, undated (hereinafter Mr. Joe's PHO Response).

30. Alternatively, Mr. Joe noted that the cumulative impact provision of the IMC requires decisionmakers to ensure that the sum total of variance approvals in an area is consistent with "policies and purposes set forth in this chapter." *IMC 18.10.430.G*. Mr. Joe contended that the use of "this chapter" in *IMC 18.10.430.G* is a reference to the City critical areas code, *IMC 18.10.340-.930*. The purposes of the City critical areas code include environmental protection and preservation, diversified economic growth that has been planned and is compatible with the vision of the community, and overall improvement of the quality of life for the residents of Issaquah. *IMC 18.10.340*. The IMC requires the City to implement those purposes by directing appropriate development to areas of the city where the development would have the least adverse environmental impact. *IMC 18.10.340*. The IMC permits only low-impact land uses in areas where development may have a substantial risk of potentially adversely impacting environmentally critical areas. *IMC 18.10.340*. Mr. Joe contended that, in keeping with the purposes of the City critical areas code, only low-impact development should occur on the site. *Mr. Joe's PHO Response*.
31. Mr. Brink submitted a memorandum on the cumulative impacts issue on behalf of the Applicant. The memorandum began by setting out the Federal Highway Administration definition of cumulative impacts, which is substantially similar to the one used in the *WSDOT Guidance*. Mr. Brink's memo then analyzed the relevant language in the IMC and argued that the language focused on future development rather than past or current development. The memorandum contended that there were no reasonably foreseeable future developments similar to the one proposed by the Applicant based on the unique factual circumstances involved in the instant application, including the fact that it involved two separate lots and would permit only one single-family residence on those lots. Mr. Brink's memo argued, citing assessor's data, that pre-existing development and ownership patterns for parcels in the area meant that it was extremely unlikely that the City would receive other, similar variance applications. *Memorandum from Terry Brink to the Hearing Examiner, dated April 15, 2016 (hereinafter Applicant PHO Response)*.
32. Mr. Brink's memo then addressed possible cumulative impacts to surface water. It noted that the City could impose additional regulatory controls on the stormwater system during the building permit phase, that the City's stormwater control requirements concerned the cumulative impacts of development over a large geographic area, and that those stormwater control regulations require applicants to ensure that post-development stormwater flow and direction are essentially identical to those existing before development. *Applicant PHO Response*.

(7) reporting the results; and (8) assessing and discussing potential mitigation issues for all adverse impacts. *Exhibit 24; Exhibit 25*.

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33. Finally, Mr. Brink's memo noted that the evidence showed that the proposed project would significantly improve wetland function and that peer-reviewed studies showed that the proposal provided an adequate factor of safety against deep-seated slope instability. *Applicant PHO Response.*

Staff Recommendation

34. City staff recommends approval of the variance, with conditions. These conditions require the Applicant to comply with the conditions of the MDNS issued for the project; obtain a City building permit before commencing clearing, grading, or construction activity; and obtain City approval for the proposed stormwater and drainage facilities. Mr. Brink stated that the Applicant accepted all recommended conditions. *Exhibit 18, Staff Report, pages 8 and 9; Statement of Mr. Brink.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide variance applications. The Hearing Examiner may approve, approve with conditions, or deny a variance application based on the decision criteria, staff report, public comments, and discussion of the issues. *IMC 18.04.490.B.*

Criteria for Review

Variances from critical areas regulations are decided using approval criteria found in IMC 18.04.490.B.2 and IMC 18.10.430.D. *IMC 18.04.490.B.2; IMC 18.10.430.C.* Before any variance may be granted, the Applicant must show:

- a. The variance is in harmony with the purpose and intent of the relevant City ordinances and the Comprehensive Plan;
- b. The variance shall not constitute a grant of special privilege which would be inconsistent with the permitted uses, or other properties in the vicinity and zone in which the property is located;
- c. The variance is necessary because of special circumstances relating to the size, shape, topography, location or surroundings of the property, and such variance will provide use rights and privileges permitted to other properties in the vicinity, located in the same zone as the property, and developed under the same land use regulations as the property requesting the variance;
- d. The granting of such variance would not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the subject property is situated;
- e. Alternative development concepts in compliance with the existing Code have been evaluated and undue hardship would result if such strict adherence to Code provisions is required;
- f. The variance granted is the minimum amount necessary to comply with the approval criteria listed above and the minimum necessary to accommodate the permitted uses proposed by the application; in addition,

- the scale of the use has been reduced as necessary to meet this requirement; and
- g. The basis for the variance request is not the result of deliberate actions of the applicant or property owner.

IMC 18.04.490.B.2; IMC 18.10.430.D.

Special criteria apply to a request for a variance to reduce wetland buffers. In addition to the criteria found in IMC 18.10.430.D, the Applicant must show:

- a. no direct or indirect, short-term or long-term, adverse impacts to wetlands would result from the proposed buffer reduction.
- b. the project includes a wetland and/or wetland buffer enhancement plan using native vegetation which demonstrates that an enhanced buffer will improve the functional attributes of the buffer to provide additional protection for wetlands functions and values and that the new buffer will provide the same level of protection to the wetland as the original buffer.

IMC 18.10.430.F.

Further:

In the granting to variances from this Code, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if variances were granted to other developments in the area where similar circumstances exist, the total of the variances should also remain consistent with the policies and intent set forth in this chapter.

IMC 18.10.430.G.

Conclusions Based on Findings

1. **With conditions, the request and proposed project would satisfy the variance criteria in the IMC set out in IMC 18.10.430.D.** The City provided reasonable notice of the application and hearing. The City also provided reasonable opportunity to comment on the application.

The variance is in harmony with the relevant provisions of the City Comprehensive Plan and City code. Approval of the variance request would permit the construction of a single-family residence. Single-family residential use is consistent with the Low Density Residential designation given to the property in the City Comprehensive Plan, as well as with the SF-S zoning district. The Applicant proposes wetland enhancements to mitigate project impacts; those enhancements would be consistent with provisions of the City

Comprehensive Plan and with the City zoning code requiring mitigation of the environmental impacts of development.

The variance would not grant the Applicant a special privilege. The Applicant proposes a use consistent with the surrounding properties, which are largely developed with single-family residences. The size of the single-family residence proposed by the Applicant is consistent with the sizes of homes built on nearby properties.

The need for the variance arises from special circumstances relating to the shape and topography of the parcel. The wetlands, steep slopes, and associated buffers would prevent the Applicant from developing the property with a single-family residence without the variance.

Variance approval would not be materially detrimental to public welfare or injurious to nearby properties. In the MDNS, the City determined that the proposal would not have significant adverse environmental impacts, and the City's determination was not appealed. The proposed single-family residence would not directly impact either the wetland or the steep slopes, and the Applicant would mitigate any encroachment within the wetland buffers by enhancing the wetlands and their buffers. The wetlands enhancement would consist of replacement of invasive species with native ones. The Applicant proposes a 3:1 mitigation ratio, which exceeds the standard mitigation ratio of 1:1. The proposed single-family residence would not adversely impact pileated woodpeckers given the mitigation measures required by the MDNS and the large forested area available in nearby Hillside Park. The proposed single-family residence would not adversely affect other listed or priority species because no such species are either present on or expected to inhabit the property. The proposed project provides an adequate factor of safety against the possibility of deep-seated slope instability. Public utilities would serve the property. The Applicant proposes a stormwater dispersion system that would not result in any increase in stormwater flow off the property, and City review will ensure that stormwater and drainage facilities prevent adverse project impacts on neighboring properties. The Applicant would install temporary and permanent erosion control measures. Conditions requiring construction staging will ensure that construction of the proposed residence does not create adverse traffic parking impacts on neighboring properties. Although neighbors around the site claimed a trail exists on the site, the Hearing Examiner cannot rule on this issue and he has only the jurisdiction granted by the City Counsel. *IMC 18.03.140, .170*. That jurisdiction does not permit the Hearing Examiner to adjudicate any claim that the public has obtained an easement by prescription. *IMC 18.03.060*

The variance requested is the minimum variance necessary to accommodate development with a single-family residence. The recording of the Native Growth Protection Easement required by the SEPA mitigation measures would essentially preclude development on the second lot making up the property. Because the Applicant could otherwise have

requested a variance to develop that lot, recording of the NGPE will effectively preclude development of that property.

The need for the variance did not result from the actions of the Applicant or the property's previous owners. The variance is necessary because of the presence the wetlands and steep slopes on the property. Neither the Applicant nor previous owners created the wetlands or the slopes. The property was platted in 1969, before the adoption of the City critical area code.

Conditions are necessary to mitigate project impacts and ensure compliance with the City code. Those conditions require the Applicant to comply with the MDNS conditions; obtain a City building permit before beginning clearing, grading, or construction; and obtain City approval for the proposed stormwater and drainage facilities. *Findings 1-25, 34.*

2. **With conditions, the request and proposed project would satisfy the criteria for approving a wetland buffer variance found in IMC 18.10.430.F.** The proposed single-family residence associated with the variance request would not result in any direct impacts to the wetlands on the property. The proposed single-family residence would impact 7,130 square feet of the 20,872 square feet of buffer area on the property. The Applicant would mitigate the buffer impacts by enhancing 9,754 square feet of wetland and 13,742 square feet of wetland buffer, a 3.2:1 mitigation ratio. This enhancement would result in the removal of invasive species and their replacement with native species. The enhancement would increase wetland functionality, especially with regard to the wildlife habitat and screening functions of the wetlands and their buffers. As noted above, conditions are necessary to mitigate project impacts and ensure compliance with the City code. *Findings 1-24, 34.*
3. **Consideration has been given to the cumulative impact of additional requests for like actions in the area.** The Hearing Examiner has reviewed the City staff memorandum on cumulative impacts, as well as the Applicant's and Mr. Joe's responses. The Hearing Examiner has considered the possibility of like actions in the area, as well as possible cumulative developmental impacts to things like wetland functionality, stormwater run-off, and slope stability. The Hearing Examiner has also considered City standards and regulations intended to mitigate developmental impacts, including cumulative impacts. *Findings 26-33.*

Discussion

At the hearing, Mr. Joe argued that City staff failed to address cumulative impacts in their report and noted that the IMC requires consideration of those impacts before any approval of a variance request. *IMC 18.10.430.G.* The Hearing Examiner agreed that cumulative impacts must be addressed, and left the record open to allow City staff to submit a cumulative impact analysis and to allow Mr. Joe and the Applicant to respond to this analysis. The City submitted the required memorandum and both the Applicant and Mr. Joe submitted memoranda analyzing the

applicability of IMC 1810.430.G to the application. The issues before the Hearing Examiner as a result of Mr. Joe's and the Applicant's replies are: (1) whether the City adequately analyzed cumulative impacts, and (2) whether there are other, reasonably foreseeable, like actions in the area that would contribute to cumulative impacts. The Hearing Examiner concludes that the answer to the first question is yes; the answer to the second is no.

Two issues were put before the Hearing Examiner in the replies to the City Memorandum. The first issue concerns whether City staff adequately analyzed cumulative impacts. Mr. Joe, in his response to City staff's memorandum, contends that City staff failed to analyze cumulative impacts in accordance with the eight-step analysis set out in the Washington State Department of Transportation's *Guidance on Preparing Cumulative Impact Analyses* (February 2008) (hereinafter the *WSDOT Guidance*). Mr. Joe contends that the analysis was therefore insufficient, requiring that the Hearing Examiner keep the record open for the City to provide further analysis.

Mr. Joe's contention finds no support in the IMC, which must be the touchstone for any decision by the Hearing Examiner. *IMC 18.03.170.F*. The IMC requires only consideration of project cumulative impacts during the variance approval process. It does not require any particular methodology for that consideration or any particular decision if the analysis reveals the likelihood of cumulative impacts. Here, City staff examined the possibility of other wetland buffer and steep slope variance requests near the property and explained that the City considered the impacts of approval of such requests when adopting its Comprehensive Plan. City staff further stated that the City has addressed cumulative developmental impacts through the adoption of standards and regulations intended to mitigate such impacts. The Hearing Examiner has read and considered City staff's analysis, as well as the Applicant's and Mr. Joe's responses. The requirements of IMC 18.10.430.G have been satisfied.

In his response, Mr. Joe also contends that the cumulative impact provision of the IMC requires that the Hearing Examiner approve only low-impact development. Mr. Joe, however, does not contend that this development is not low impact; the evidence before the Hearing Examiner indicates that it is. The City issued a Mitigated Determination of Nonsignificance (MDNS) for this proposed project. That determination, which was not appealed, means that the project would not have probable significant adverse environmental impacts. Further, even if the Hearing Examiner ignored the MDNS and considered only the evidence in the record, that evidence shows that the project would improve wetland and wetland buffer function, would not impact species of concern or threatened or endangered species, and would provide an adequate factor of safety against deep-seated slope instability. City standards and regulations mitigate the effects of development, and the Applicant would need to comply with those standards. The proposed project comports with any low-impact development standard found in the IMC.

The second issue is whether there are any reasonably foreseeable "like actions" in the area. *IMC 18.10.430.G*. The IMC does not define cumulative impacts. City staff and Mr. Joe offer a definition of cumulative impacts taken from the *WSDOT Guidance*. The Applicant offers a nearly identical definition taken from the Federal Highway Administration's Environmental

Review Toolkit. Lacking a specific definition from the City Council, the Hearing Examiner accepts these definitions as relevant and helpful.

The definitions offered by City staff, Mr. Joe, and the Applicant recognize that reasonably foreseeable future actions may contribute to cumulative impacts. IMC 18.10.430.G requires that these reasonably foreseeable future actions be “like actions.” City staff and Mr. Joe implicitly argue that any variance is a like action for purposes of the IMC. The Applicant contends that a like action must offer a reasonable comparison and that here such a comparison requires a variance request for two lots to develop a single house.

The Applicant presents a compelling case that a “like action” must involve a variance request to develop one single-family residence on two lots. The City informed the Applicant that it had concerns about the initial application, which envisioned one house on one lot. To move forward with the application, the Applicant revised the request and proposed project to include a second lot, a lot that will apparently be largely be protected as a Native Growth Protection Easement. The Applicant has, therefore, surrendered either the right to develop one of the two lots with a single-family residence or the right to demand compensation through a constitutional takings claim. The “like actions” analysis under IMC 18.10.430.G should recognize that sacrifice by the Applicant.

Accordingly, the Hearing Examiner must look to whether it is reasonably foreseeable that another applicant would seek a variance to build a single-family residence on two different lots in the area. No evidence provided by the City or Mr. Joe indicates that such a request is reasonably foreseeable. The evidence provided by the Applicant indicates that there is no reasonably foreseeable possibility of such a request. There is therefore little or no chance that other “like actions” will combine with the proposed project to create cumulative impacts.

DECISION

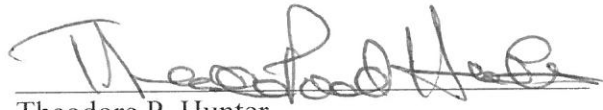
Based on the preceding Findings and Conclusions, the request for a variance from City of Issaquah Critical Areas Regulations to allow construction of a single-family residence at 645 Mt. Everest Lane SW is **APPROVED**, with the following conditions:

1. Construction clearing and grading limits shall be limited to the proposed development area. The remaining site area is wetland, steep slope critical areas and associated buffers and shall be recorded in a Native Growth Protection Easement (NGPE), precluding future development/improvements and protecting existing vegetation. The NGPE shall be recorded on property title prior to final building permit approval.
2. Permanent survey stakes shall be set to delineate the boundaries between the Native Growth Protection Easement (NGPE) and the development area, prior to final building permit approval.

3. The Applicant shall be responsible for providing an adequate area for construction staging. Construction staging shall not be allowed on site outside of approved clearing and grading limits. The construction staging area shall not block the driveway of the neighboring property accessed off the Mt. Everest Lane SW cul-de-sac and shall maintain emergency access.
4. In order to clearly demarcate the wetland boundary and to minimize encroachment into the wetlands by future residents and pets, the Applicant shall install a split rail fence along the wetland boundaries.
5. Because of the close proximity of the landscape/yard area to the wetland, the use of fertilizers and herbicides/pesticides could impact water quality and wetland vegetation. To address this impact, future residents shall only use slow-release fertilizers and herbicides/pesticides approved for use in aquatic environments.
6. The Applicant shall prepare a wetland hydrologic analysis to demonstrate pre-development hydrology to both Wetlands A and B would be maintained. This shall be approved by the Development Services Department prior to issuing construction permits.
7. Final wetland/wetland buffer enhancement mitigation plans shall be submitted to include planting densities and performance standards consistent with the King County Critical Areas Mitigation Guidelines. Final mitigation plans shall be approved prior to issuance of building permits
8. To ensure successful installation of the proposed mitigation plantings, the consulting biologist shall verify in writing that the planting has been installed per the approved plan. An as-built plan of the mitigation planting shall be provided prior to final occupancy approval of the building permit.
9. A 5-year monitoring/maintenance bond is required for the wetland/wetland buffer mitigation plan; equal to 50% of the cost of plants, installation, and the cost of 5 years of maintenance and monitoring. The bond is required prior to final building permit approval.
10. Site-specific building permit plans were not evaluated by the geotechnical study. The Applicant shall submit a geotechnical report evaluating specific building and grading plans with submittal of building permits. A structural engineer shall design the house foundation per the geotechnical design criteria. A third-party independent review of the geotechnical report and building plans will be required at the Applicant's expense.
11. The alignment of the side sewer line shall be reviewed to minimize impacts to trees and existing vegetation and to approve a construction method that minimizes slope disturbance, prior to issuance of construction permits.

12. The existing snags within the development area and other large trees that would provide habitat as downed logs shall be placed within the wetland or upland forested area of the site. The number, species and size of downed logs shall be shown on the mitigation plans, required to be approved by the Development Service Department prior to issuance of construction permits.
13. A City of Issaquah Building Permit shall be approved prior to commencing clearing, grading, and construction activity.
14. Stormwater/drainage review will be required with a Building Permit and required stormwater facilities will be determined based on the City's stormwater regulations, the *2011 Addendum to the King County Surface Water Drainage Manual*. One of the Core Requirements is that the Applicant must demonstrate that onsite drainage facilities and/or flow control BMP's would not create a significant adverse impact to the downhill properties or drainage systems.

Decided this 25th day of April 2016.


Theodore P. Hunter
Hearing Examiner
Sound Law Center